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Paper No. 11
Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Atlas Oil Company

Serial No. 75/543,196

Raymond M. Galasso of Simon Galasso & Frantz PLC for Atlas Oil Company.

Melvin T. Axilbund, Trademark Examining Attorney, Law Office 113 (Meryl Hershkowitz, Managing Attorney)

Before Seeherman, Hanak and Bottorff, Administrative Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the mark FAST TRACK, in typed form, for services recited in the application, as amended, as "carry-out and self-service restaurant services provided in connection with retail gasoline supply and convenience store services."¹

¹ Serial No. 75/543,196, filed August 25, 1998 as an intent-to-use application under Trademark Act Section 1(b).

The Trademark Examining Attorney has refused registration on the ground that applicant's mark, as applied to its services, so resembles the mark J.J.'S FASTRAC, previously registered (in typed form) for "retail convenience store services"² as to be likely to cause confusion, to cause mistake, or to deceive. See Trademark Act Section 2(d), 15 U.S.C. §1052(d).

The refusal to register having been made final, applicant has filed this appeal. Applicant and the Trademark Examining Attorney have filed main appeal briefs,³ but applicant did not file a reply brief. No oral hearing was requested. We affirm the refusal to register.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential

² Registration No. 2,153,115, issued April 21, 1998.

³ We have given no consideration to the evidentiary materials attached to applicant's brief, in view of the Trademark Examining Attorney's objection thereto. See Trademark Rule 2.142(d).

characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We turn first to a consideration of the relationship between applicant's services, as recited in the application, and the services recited in the cited registration. The Trademark Examining Attorney has presented persuasive NEXIS and third-party registration evidence which establishes that restaurant services and convenience store services are commonly offered together. Applicant itself, according to its recitation of services, intends to offer its restaurant services in connection with convenience store services. We accordingly find that applicant's services are similar and related to registrant's services.

Furthermore, given the absence of any limitations or restrictions in applicant's or registrant's recitations of services, we find that the respective services are marketed in all normal trade channels and to all normal classes of purchasers for such services. *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Again, applicant's own recitation of services demonstrates the overlap in the trade channels for the respective services.

We turn next to the issue of whether applicant's mark and registrant's mark, when compared in their entireties in terms of appearance, sound and connotation, are similar or dissimilar in their overall commercial impressions. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant argues that its mark is readily distinguishable from registrant's mark due to registrant's use of the possessive designation "J.J.'S" and registrant's novel misspelling of the words FAST TRACK as FASTRAC. We disagree. Although applicant's mark is not identical to registrant's mark, we nonetheless find that the marks, when viewed in their entireties, present similar rather than dissimilar overall commercial impressions.

The FASTRAC portion of registrant's mark, although not visually identical to applicant's mark FAST TRACK, nonetheless would readily be recognized as the phonetic and connotative equivalent of FAST TRACK. The presence of this

designation in both marks contributes to the overall similarity of the marks.

Applicant argues, however, that the possessive designation "J.J.'S" is an important feature of registrant's mark to which the Trademark Examining Attorney has given insufficient consideration. Although FASTRAC and FAST TRACK might both connote "speedy service" as applied to the respective services, applicant argues, registrant's use of "J.J.'S" at the beginning of its mark creates a different impression on consumers because "a sense of ownership is imparted." (Brief, at 5.) "Instead of merely being speedy service, it is a service brought to you personally by J.J. This ownership serves to distinguish Registrant's mark and Appellant's mark." (*Id.*)

Although we agree that "J.J.'S" is an important feature of registrant's mark which cannot be ignored in our comparison of the marks, we find that its presence in the cited registered mark does not suffice to overcome the overall confusing similarity between the marks which arises from their shared use of the highly similar designations FAST TRACK and FASTRAC.

In registrant's mark, "J.J.'S" would be perceived as being in the nature of a trade name or a house mark which is used in connection with the "product mark," FASTRAC.

The general rule is that the presence of a trade name or a house mark in one of two otherwise confusingly similar marks will not serve to avoid a likelihood of confusion.⁴ Exceptions to this general rule are made (1) in cases where the two "product" marks have recognizable differences, such that the degree of similarity between them is sufficiently slight that the addition of the trade name or house mark is enough to render the marks as a whole distinguishable;⁵ and (2) in cases where the product mark is merely descriptive of the goods or services and therefore would not be regarded by purchasers as a source-indicator.⁶ Neither of these exceptions to the general rule applies in this case.

⁴ See, e.g., *In re Apparel Ventures, Inc.*, 229 USPQ 225 (TTAB 1986)(SPARKS for shoes, boots and slippers confusingly similar to SPARKS BY SASSAFRAS for women's clothing items); *In re Riddle*, 225 USPQ 630 (TTAB 1985)(RICHARD PETTY'S ACCUTUNE (and design) for automotive service centers confusingly similar to ACCUTUNE for automotive testing equipment); *In re Champion International Corporation*, 196 USPQ 48 (TTAB 1977)(HAMMERMILL MICR CHECK-MATE for paper for writing, printing, duplicating and office use confusingly similar to CHECK MATE for envelopes); and *In re C. F. Hathaway Company*, 190 USPQ 343 (TTAB 1976)(HATHAWAY GOLF CLASSIC for men's knitted sport shirts confusingly similar to GOLF CLASSIC for men's hats).

⁵ See, e.g., *The Morrison Milling Co. v. General Mills, Inc.*, 168 USPQ 591 (CCPA 1971)(MORRISON'S CORN-KITS for prepared corn bread mix not confusingly similar to KIX or CORN KIX for breakfast cereal); *Rockwood Chocolate Co., Inc. v. Hoffman Candy Co.*, 152 USPQ 599 (CCPA 1967)(ROCKWOOD BAG-O-GOLD for candy not confusingly similar to CUP-O-GOLD for candy); and *S.M. Flickinger Co., Inc. v. Beatrice Foods Co.*, 174 USPQ 51 (TTAB 1972)(MEADOW GOLD ZOOPER DOOPER (and design) for ice cream, ice milk, etc. not confusingly similar to SUPER DUPER for ice cream).

⁶ See, e.g., *In re Application of Merchandising Motivation, Inc.*, 184 USPQ 364 (TTAB 1974)(MMI MENS WEAR for fashion consulting

The first exception is inapplicable because, although FASTRAC and FAST TRACK are not identical in terms of appearance, they nonetheless are identical in terms of sound and connotation. Given this identity of sound and connotation, the "recognizable differences" in terms of appearance are too slight to trigger the first exception to the general rule. This is not a case where the two designations are only marginally confusingly similar, such that the mere addition of the house mark is enough to tip the balance back over to the "not confusingly similar" side of the scale. Rather, we find that FASTRAC and FAST TRACK are highly similar to each other, a similarity that is not negated by the presence of the house mark "J.J.'S" in registrant's mark.

The second exception to the general rule is inapplicable in this case because registrant's "product" mark FASTRAC is not a merely descriptive designation; we find that it is, at most, a slightly suggestive term as applied to registrant's services. The source-indicating significance of registrant's mark is not derived solely from its use of the house mark "J.J.'S," and therefore the

services not confusingly similar to MENSWEAR for a semimonthly magazine; and *Food Specialty Co., Inc. v. Kal Kan Foods, Inc.*, 180 USPQ 136 (CCPA 1973)(KAL KAN KITTY STEW and design not confusingly similar to KITTY for cat food).

presence of "J.J.'S" in registrant's mark is insufficient to trigger the second exception to the general rule.

In summary, upon comparison of applicant's and registrant's marks in their entireties, we find them to be confusingly similar. The points of difference between the two marks are outweighed by the similarity in their overall commercial impressions, a similarity which is derived from their shared use of the distinctive designation FAST TRACK or its phonetic and connotative equivalent FASTRAC.

Applicant argues that there have been no instances of actual confusion. However, there is no evidence in the record from which we might conclude that there has been any significant opportunity for actual confusion to have occurred. Applicant itself asserts that there has been no geographic overlap or market interface between the parties' services, inasmuch as applicant operates primarily in the Midwest while registrant operates primarily in Texas. In such circumstances, the alleged absence of actual confusion is entitled to little or no probative weight in our likelihood of confusion analysis. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768 (TTAB 1992).

Having considered all of the evidence of record pertaining to the *du Pont* likelihood of confusion factors, and in view of our findings regarding the similarity of the

marks, the similarity of the services, and the similarity of the trade channels and classes of purchasers for those services, we conclude that confusion is likely to result from applicant's use of its mark on its recited services, and that registration of applicant's mark accordingly is barred under Trademark Act Section 2(d). Any doubt as to that conclusion (we have none) must be resolved against applicant. *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.